IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ADMIRALTY AND VICE ADMIRALTY JURISDICTION

ADMIRALTY SUIT NO. 30 OF 2002

Dallah Albaraka Investment
Co. Ltd., .. Plaintiffs.

vs.

MT "SYMPHONY 1"
ex. MT "ARABIAN LADY & Anr. .. Defendants.

Mr. D.C. Gomes with V.K. Rambhadran i/by A. D'Souza
for plaintiffs.
Mr. S. Aole i/by India Law Alliance
for Defendant No. 1.
Mr. V.V. Sheth with R.A. Fernandes for
Defendant No. 2.
Mr. R. Narichania with Nirav Shah
i/by DSK Legal for Defendant No.3.
Mr. A.M. Vernekar with M. Khatri
for Defendant No. 4.

CORAM : S.U.KAMDAR, J.

DATE : 18th July, 2005.

ORAL JUDGMENT :

. The present suit has been filed by the plaintiffs inter alia for the relief of declaration that there is a due and payable a sum of US $

7,806,188.77 to the plaintiffs by a company known as Gulf Oil in accordance with the particulars of claim annexed as Exhibit "E" to the plaint. The plaintiffs have also sought a declaration that the Gulf Oil had failed and neglected and/or refused to pay the said sum or any part thereof. A further declaration is sought that the repayment of the said sum is duly secured by a valid and subsisting mortgage of the defendant vessel in favour of the plaintiffs and that the plaintiffs are entitled to enforce and/or crystalize the said security of the defendant vessel mortgaged to them by the arrest, condemnation and sale. The plaintiffs have also sought a declaration that they are entitled to obtain possession of the said vessel and retain possession thereof. By prayer clauses (b) and (c) of the said suit the plaintiffs have sought a mandatory order of injunction for delivery and possession of the said vessel until the full mortgaged debt is repaid. There are various other reliefs which are sought for by the plaintiffs in the present suit. By prayer (f) of the said suit, the plaintiffs have sought that the defendant vessel together with engine, machinery, boats, tackles, outfit, fuels, spares, appurtenances and stores, etc., be condemned and sold by and pursuant to the orders and directions of this Court and the net sale proceeds realised therefrom be paid over to the plaintiffs towards the dues of their claim. The

aforesaid reliefs are sought in the background of the facts which are briefly enumerated as under :-

2. The plaintiffs originally filed their suit only against the defendant vessel known as m.t. "SYMPHONY I" which was formerly known as ARABIAN LADY. The said vessel is flying the flag of St. Vincent and Grenadines and is registered at the port of Kingstown. According to the plaintiffs one Gulf Oil Co. WLL, incorporated under the United Arab Emirates laws were the owners of the said vessel at all points of time. It is the case of the plaintiffs that some time in or about February 2000 the said Gulf Oil were desirous of purchasing the said vessel and thus sought from the plaintiffs a loan of the sum of US$ 1.5 million to finance the acquisition of the defendant vessel. The plaintiffs accepted the said request and advanced the said loan amount of the sum of US$ 1.5 million. According to the plaintiffs, the said loan was governed by the agreement called ’Murabaha Facility Agreement" dated 10.2.2000 which was executed by the said company Gulf Oil. Under the said Murabaha Facility Agreement Gulf Oil executed a First Preferred Mortgage dated 8.7.2000, inter alia mortgaging the defendant vessel to the plaintiffs. Under the terms and conditions of the said agreement, the said vessel would remain as a security for due repayment of the said amount covered by the said Murabaha

Facility Agreement dated 10.2.2000. The mortgage of the said defendant vessel has been registered with St. Vincent and the Grenadines Registry and they have confirmed and certified the same. It is the further case of the plaintiffs that the plaintiffs have also granted to Gulf Oil an unsecured trade finance facility under another Murabaha Facility Agreement dated 22.10.1999 and according to the plaintiffs since the Gulf Oil did not make the necessary payment of the amount lent and advanced, they are indebted to the plaintiffs for the sum of US$ 5,421,550.94 under the said finance facilities. Under the Murabaha Facility agreement the defendants were indebted for the sum of US$ 1,445,052 and thus aggregate claim of the plaintiffs under the aforesaid two agreements is around US$ 6,866,602.94.

3. Sometime in or about March 2001, at the request of Gulf Oil the plaintiffs restructured the said loan facility of the sum of US$ 5 million. Subsequently the said Gulf Oil extended and/or enhanced the security of the said first preferred mortgage in respect of the defendant vessel for covering the said loan liability of the defendant payable to the plaintiffs. Thus, it is the claim of the plaintiffs that the said defendant vessel is duly mortgaged to the plaintiffs for repayment and discharge of the liabilities covered under the aforesaid two agreements. However, the said Gulf

Oil Company having failed to repay the said loan amount the plaintiffs become entitled to enforce the said mortgage.

4. It come to the knowledge of the plaintiffs that the defendant vessel was arrested by this Court on 21.6.2002 in an action preferred by Liverpool and London P&I Club for unpaid calls and even the crew of the said vessel arrested the ship for their unpaid wages and that Gulf Oil did not take any steps to release the said vessel. Accordingly, the said vessel was in the custody of this Court and the said Liverpool and London P&I Club took out an application for sale of the defendant vessel. The vessel was also arrested in the present suit and it is not in dispute before me that pursuant to the same, the said vessel has been sold by this Court and the sale proceeds thereof are deposited in this Court. The defendants nos. 2, 3 and 4 are other creditors who are also claiming the amounts due and payable against the said ship in their favour. Two of the defendants being defendant no. 2 and 3 are the decree holders whereas the defendant no. 4 has filed a suit for supply of necessaries and the said suit being Suit No. 35 of 2002 is also pending and has been tagged along with the present suit for hearing and final disposal.

5. In the written statement filed by the defendants excluding the defendant no.1 the two issues one pertaining to the jurisdiction of this Court to entertain and try the present suit as well as the maintainability of the present suit were raised and the said issues are accordingly framed. On merits according to the defendants there is no valid mortgage in favour of the plaintiffs and thus the plaintiffs are not entitled to the said sale proceeds. If the plaintiffs are able to establish a valid mortgage then of course they would have first right to the said sale proceeds over and above the rights of the defendant nos. 2, 3 and 4. Thus, the defendant nos. 2 to 4 had entered their appearance and they are added as parties to the present suit and they are seeking to defeat the claim of the plaintiffs herein.

6. On the aforesaid contentions of the parties, the following issues were framed.:

1. Whether the plaintiffs prove that Gulf Oil Co. WLL were/are the owners of the Defendant vessel at the material time?

2. Whether the plaintiffs prove that they advanced a sum of US$ 1.5 million or any part

thereof to Gulf Oil for acquisition of the Defendant vessel?

3. Whether the plaintiffs prove the execution, authenticity and the contents of the "Murabaha Facility Agreement", dated 10th February 2000?

4. Whether the plaintiffs prove the execution, authenticity and contents of the First Preferred Mortgage, dated 8th July 2000 and that the same was registered with the Registry of St. Vincent and The Granadines?

5. Whether the plaintiffs prove that they granted Gulf Oil an "Unsecured Trade Finance Facility" and that the terms thereof were recorded in a Murabaha Agreement, dated 22nd October 1999?

6. Whether the plaintiffs prove that they disbursed money to Gulf Oil from time to time, under the said Murabaha Agreement dated 22nd October 1999?

7. Whether the plaintiffs prove that Gulf Oil WLL were indebted to them in the sum of US$ 5,421,500.94, under the Term finance facility, as of 15th March 2001?

8. Whether the plaintiffs prove that Gulf Oil WLL were indebted to them in the sum of US$ 1,445,052.00 as of 15th March 2001, under the Murabaha Facility Agreement dated 10th February 2000?

9. Whether the plaintiffs prove that any portion of the sum of . US$ 6,866,602.94 was secured by the First Preferred Mortgage, dated 8th July 2002?

10. Whether the Plaintiffs prove that any part of the sum of US $ 6,866,602.94 related to the alleged Murahaba Agreement, dated 22nd October 1999?

11. Whether the Plaintiffs prove that Gulf Oil requested them to restructure the indebtedness to the extent of US$ 5 million?

12. Whether the Plaintiffs prove that Gulf Oil enhanced the security of the First Preferred Mortgage, over the Defendant vessel to cover an additional minimum sum of US$ 2.5 pursuant to such a request?

13. Whether the plaintiffs prove First and Second Preliminary Agreements, dated 30th March 2001

and 2nd April 2001 respectively?

14. Whether the plaintiffs prove the Deed of Mortgage dated 11th July 2001 and that the same has been duly registered with the Registry of St. Vincent and the Grenadines?

15. Whether the plaintiffs prove that subsequent Mortgage superceded the prior mortgage?

16. Whether the plaintiffs prove that Gulf Oil has not repaid the mortgage debt/any part thereof?

17. Whether the plaintiffs prove that there has been an "Event of Default" on the part of Gulf Oil W.L.L.?

18. Whether the plaintiffs prove the notice dated 25th August 2002 and that Gulf Oil has received the same?

19. Whether the plaintiffs prove that there is a sum of . US$ 7,806,188.77 payable by Gulf Oil to the Plaintiffs?

20. If the answer to question No. 19 is in the affirmative then, whether the Plaintiffs prove that the said sum (or any part thereof)

is secured by the mortgage of the Defendant vessel in their favour?

21. Whether this Court has the jurisdiction to adjudicate the Plaintiffs suit?

22. Whether the 2nd Defendants prove that the Plaintiffs have acted without vigilance or displayed laches in pursuing the present suit claim?

23. What orders?

24. What reliefs?

Additional Issues.

1. Do the 3rd defendants prove that the agreement dated 22nd October 1999 had expired due to efflux of time and was therefore invalid, as averred by them in paragraph 1 (b) of the written statement?

2. Do the 3rd defendants prove that for reasons stated in paragraph 1(a) to 1(h) of their written statement the alleged agreements dated 22nd October 1999 and / or alleged agreement dated 10th February 1999 and / or alleged 1st preferred mortgage of the 1st

defendant vessel under mortgage deed dated 8th July 2000 and /or the alleged 2nd preferred mortgage under mortgage deed dated 11th July 2001 and / or alleged preliminary agreement dated 30th March 2001 and / or alleged preliminary agreement dated 2nd April 2001 were collusive and / or sham and / or invalid documents as averred in the said paragraph ?

3. Whether the 3rd defendants prove that the plaintiffs have filed the suit in collusion with "Gulf Oil", the owners of the 1st defendant vessel?

4. Do the defendants prove that de-registration of the 1st defendant vessel from the registry of St. Vincent and Grenadines has rendered the mortgage dated 8th July 2000 and 11th July 2001 ineffective and / or infructuous and / or unenforceable as alleged by them in paragraph 8 of the written statement ?

5. Whether the plaintiffs are entitled to take possession of the vessel as alleged by them in paragraph 21 of the plaint and denied by these defendants in paragraph 15 of the written statement ?

7. The matter was referred to the Commissioner for recording evidence and the Commissioner has in detail recorded the evidence of the parties and both the parties have filed various documents before the Commissioner. The Commissioner Mr. K.R. Khata made his report dated 15.12.2004 and filed the same in this Court. Before the Commissioner the plaintiffs led the evidence of one Mr. Neel Hokings. The said witness has produced various documents as the documentary evidence which has also been filed in this Court.

8. I decided to try the issues of jurisdiction and maintainability as preliminary issues and accordingly I have heard the parties on the aforesaid two issues of jurisdiction and maintainability of the suit.

9. The learned counsel appearing for the defendants nos. 2 to 4 inter alia contended before me that this Court has no jurisdiction to entertain and try the present suit. In support of their contention they have relied upon the provisions of Section 11 of the Admiralty Court Act, 1961. The said Section 11 reads as under :-

> "11. 3 & 4 Vict c 65, in regard to mortgages extended to Court of Admiralty The

> High Court of Admiralty shall have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1854, whether the ship or the proceeds thereof be under arrest of the said court or not."

It has been contended that for the purpose of this Court having jurisdiction to try the claim of mortgage in respect of any vessel the said mortgage has to be duly registered according to the provisions of the Merchant Shipping Act, 1854 and now the said Merchant Shipping Act, 1854 has since been replaced by the provisions of the Merchant Shipping Act, 1958. It has been contended that unless mortgage of the said vessel is duly registered under the provisions of the Merchant Shipping Act, 1958, this Court cannot entertain any suit for enforcement of the mortgage of any vessel in the exercise of jurisdiction conferred on this Court under the provisions of the Admiralty Court Act, 1961. It has also been pointed out to me by the learned counsel for defendant nos. 2 to 4 that admittedly the vessel is not registered under the provisions of the Merchant Shipping Act, 1958 but the mortgage of the vessel is registered in the St. Vincent and The Grenadines Registry. Thus, it has been submitted that this Court has no jurisdiction

to entertain and try the present suit and thus the suit should be dismissed for want of jurisdiction. The learned counsel appearing for defendant nos. 2 to 4 relied upon a judgment of the learned Single Judge of this Court in the case of Dimitrios Paizis and others v. Motor Vessel "Nicos" and others, reported in AIR 1983 BOMBAY 178. By relying upon the aforesaid judgment, the learned counsel for defendant nos. 2 to 4 has contended that this Court would have jurisdiction only if either the said foreign vessel is registered under the provisions of the Merchant Shipping Act, 1958 or if the accredited representative of the foreign State has intervened and consented to the exercise of such jurisdiction or in an event if the parties consented to exercise of such jurisdiction. In the absence of any of the aforesaid conditions precedent having been complied with, this Court would not have jurisdiction in respect of the enforcement of a mortgage which mortgage is registered under the foreign law in the foreign State and not under the provisions of the Merchant Shipping Act, 1958. The learned counsel appearing for the defendant nos. 2 to 4 has drawn my attention to paragraphs 17, 18, 24, 25 and 26 of the said judgment which are reproduced hereinunder:-

> "17. Coming to the Admiralty Courts Act, 1861, which came into operation on June 1, 1861, S. 11 thereof provided that the "High

Court of Admiralty shall have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of "The Merchant Shipping Act, 1854,' whether the Ship or the Proceeds thereof be under the Arrest of the said Court or not". As is manifest from the preamble of that Act, it was enacted to, "extend the Jurisdiction and improve the Practice of the High Court of admiralty". The underlining is mine in order to emphasise that the 1961 Act did not and was not intended to repeal, circumvent or circumscribe the provisions of the earlier 1840 Act, but rather to extend the jurisdiction conferred by that Act. This is unmistakably brought to the forefront in the "Tables Showing The Effect of Year's Legislation" at the commencement of Law Reports Status 24 and 25 Vict, 1861, the relevant excerpt whereof is as under.--

"24 Vict. and 24 & 25 Vict.	Effect	Act Affected	Subject to Act affected
x	x	x	x
x	x	x	x
x	x	x	x
x	x	x	x
S.11	Extends	8 & 4 Vict. C. 65	Admiralty Court Jurisdiction
x	x	x	x
x	x	x	x
x	x	x	x"

As also observed in Williams & Bruce Admiralty Practice, 1902, at page 45 --

"This jurisdiction is in addition to the jurisdiction already existing under the Act of 1840."

Closer home, it was observed in Kamalakar v. Scindia Steam Navigation Co. (1961) 62 Bom LR 995, (1005): (AIR 1961 Bom 186 at pp. 192-93), that the 1961 Act is complementary to the 1840 Act. It is also not without its own significance that while S. 31 of the 1861 Act expressly repealed Act No. 2 HEN-4C-11, the Act of 1840 was not repealed but on the contrary extended and improved by the later 1861 Act.

"18. The law administered by the Admiralty Court is not the ordinary municipal law of England but is the law which by Act of Parliament, or reiterated decisions, traditions and principles has become the English Maritime Law. (The Gaetano and Maria, (1882) 7 PD 137 and Scindia Steam Navigation Co. (AIR 1961 Bom 186) (supra). There can be no doubt that by virtue of the reiterated principles and decisions (to wit, "The See Reuter" (1811-165 ER 1219) and "The

Evangelistria" (1876-2 PD 241) (supra), English Maritime Law confers on the Admiralty Court jurisdiction in questions of mortgage of foreign ships arising between foreigners if the case had been referred to its jurisdiction either by consent of parties or by the intervention of the accredited representative of the foreign State concerned. There is also no doubt that the jurisdiction under the 1840 Act, was extended by the 1861 Act.

"24. The reliance placed by Mr. Meghani on an observation in Neptune (1834) 3 Hag Adm. 129, (132), that the Admiralty Court has no jurisdiction on questions of mortgage, is misplaced. The observation must be read in context with the facts of that case and the circumstances in which it was made and not in its isolation. That was not a case of a mortgagee enforcing anything but was a case where a merchantman claimed priority in lien over the sale proceeds of a ship as against a person who claimed to be a mortgagee in possession; and the Court actually considered the priorities between the mortgagee and the merchantman. Similarly misplaced is the reliance placed by Mr. Meghani on the decision in Sebra M Bogat v.

The Steamboat John Jay, (1854-57) 15 Law ed 2d 95, where it was held that the Court of Admiralty has no jurisdiction to decree the sale of a ship for unpaid mortgage. That decision was based upon the Neptune decision (supra) which in turn had no relevance to the facts of the present case.

25. Reliance was also placed by Mr. Meghani on State of Kerala v. Cochin Chemical Refineries, AIR 1968 SC 1361, where it was held that failure of a mortgagee to advance money undertaken by him does not invalidate the mortgage transaction. Mr. Meghani also relied on a passage from Salmond on Jurisprudence, 12th Edn. at page 115 that --

> "The right vested in a mortgagee has an independent existence. It will, or may, remain outstanding in the mortgagee even after the extinction of the debt. When thus left outstanding it must be re-transferred or surrendered to the mortgagor and the right of the mortgagor to this re-assignment or surrender is called his right or equity of redemption. The existence of such an equity of redemption is therefore the test of a mortgage."

I have alluded to these references for what they are worth. Further comment is unnecessary.

> "26. Thus the position that emerges is that the jurisdiction of this Court is stabilised as it existed at the time of the passing of the 1890 Act and that this Court exercises the same jurisdiction in Admiralty as was done by the High Court of Admiralty in England in 1890 either "under any statute or otherwise". Thus the non-ratification by India of the Brussels conventions relied on by Mr. Meghani is of no consequence. There can be no doubt that having regard to the Colonial Courts of Admiralty Act 1890 and the India Admiralty Act 1891, the High Court of Judicature at Bombay will have jurisdiction to entertain claims, questions or suits relating to a mortgage of a foreign ship and arising between foreigners, either if the accredited representative of the foreign State has intervened and consented to the exercise of such jurisdiction or if the parties consented to such exercise of jurisdiction, as done in the present case by Cl. 16B of the Mortgage Deed."

By relying upon the aforesaid paragraphs it has been contended that the Admiralty Court will have jurisdiction only upto the Admiralty Act of 1890 and by the said Act has stabilised the jurisdiction of

this Court as it existed in England of the Supreme Court of Judicature in England as prevailing in 1890 and subsequent statutes which have been introduced in England cannot be taken into consideration. According to the learned counsel for the defendant nos. 2 to 4 under section 11 of the Admiralty Court Act, 1861 there has to be a registration of the mortgage of the ship under the Merchant Shipping Act, 1958. The provisions of the Merchant Shipping Act, 1958 apply only to the Indian vessels and have no application to the mortgages registered abroad or to foreign vessels and thus according to the learned counsel for defendant nos. 2 to 4 this Court would have no jurisdiction to entertain and try the present suit. It has been thus contended that this Court ought not to exercise jurisdiction and pass any decree in the present suit and the suit should be dismissed.

10. The learned counsel for the plaintiffs has on the other hand invited my attention to the judgment of the Apex Court in the case of M.V. Elisabeth and others. v. Harwan Investment & Trading Co. and another, reported in AIR 1993 SC 1014 and it has been contended that the view taken by the learned Single Judge of this Court is no more a good law. It has been contended that the Apex Court in the aforesaid judgment has held that such a narrow construction ought not to be granted to the

provisions of Section 11 of the Admiralty Court Act, 1861. It has been further contended that the Apex Court has held that even subsequent enactments right upto the Supreme Court of Judicature (Consolidation) Act, 1925 are applicable and the jurisdiction of the High Court under the Admiralty Court Act, 1861 has to be determined on the basis of the jurisdiction which the English Courts possessed under the provisions of the Supreme court of Judicature (Consolidation) Act, 1925 in so far as Admiralty Jurisdiction is concerned. In support of the aforesaid contention, the learned counsel for the plaintiffs has relied on paragraphs 26, 27 and 36 of the said judgment which read as under :-

> "26. Assuming that the admiralty powers of the High Courts in India are limited to what had been derived from the Colonial Courts of Admiralty Act, 1890, that Act, having equated certain Indian High Courts to the High Court of England in regard to admiralty jurisdiction, must be considered to have conferred on the former all such powers which the latter enjoyed in 1890 and thereafter during the period preceding the Indian Independence Act, 1947. What the Act of 1890 did was, as stated earlier, not to incorporate any English statute into Indian law, but to equate the admiralty

jurisdiction of the Indian High Courts over places, persons, matters and things to that of the English High Court. As the admiralty jurisdiction of the English High Courts expanded with the progress of legislation, and with the repeal of the earlier statutes, including in substance the Admiralty Court Acts of 1840 and 1861, it would have been reasonable and rational to attribute to the Indian High Courts a corresponding growth and expansion of admiralty jurisdiction during the preindependence era. But a restrictive view was taken on the question in the decision of the High Courts cited above.

"27. There is no reason why the jurisdiction of the Indian High Courts should have been considered to have frozen and atrophied on the date of the Colonial courts of Admiralty Act, 1890. If this had not been considered to have happened, and a liberal construction had been adopted by Courts, the admiralty jurisdiction of the High Court would in any case have been considered to have progressed up to the level of the English Administration of Justice Act, 1928, which was the last of a series of enactments in England on the

subject prior to 1947, and consequently the Indian High Court would have been treated as a consolidated Court on the basis of the (English) Supreme Court of Judicature (Consolidation) Act, 1925, exercising identical and unlimited jurisdiction, and not a distinct or 'prescribed' admiralty jurisdiction, limited and confined to the Admiralty Court Act, 1861, as it is now treated to be by some of the High Courts in the decisions cited above. All this is perhaps the result of the reasoning in the decision of the Privy Council in The Yuri Maru v. The Waron, 1927 AC 906.

"36, The Admiralty Court Act, 1861 and the subsequent enactments were consolidated by the Supreme Court of Judicature (Consolidation) Act, 1925. The admiralty jurisdiction of the English High Court was redefined by this Act to include various matters such as any claim "for damages done by a ship", any claim "arising out of an agreement relating to the use or hire of a ship"; or "relating to the carriage of goods in a ship", or "in tort in respect of goods carried in a ship". This jurisdiction was, however,not available if "at the time of the institution of the proceedings any

> owner or part owner of the ship was domiciled in England" [See Section 22(i),(iv) and (vii)]. By the Administration of Justice Act, 1928, the jurisdiction in the High Court by the Supreme Court of Judicature (Consolidation) Act, 1925 was declared to belong to all divisions of the High Court. The Admiralty Court was thus empowered to entertain, apart from actions in rem, any claim in personam which could be brought in any other division of the High Court."

11. I have considered the rival submissions of the parties. I am of the opinion that the judgment of the Apex Court in the case of M.V. Elisabeth and another vs. M/s. Harwan Investment & trading Co. and another (supra) makes it clear that the jurisdiction of the High Court under the Admiralty Court Act, 1861 cannot be narrowed down as contemplated under the provisions of the said Act. The Apex Court has taken the view that the subsequent legislation which has enhanced the jurisdiction of the Admiralty Court ought to be considered as duly applied to the Admiralty Courts in India. It is because the Admiralty jurisdiction of the England Courts and the Admiralty jurisdiction of the Indian Courts is at par and equivalent and thus when the jurisdiction of the English courts has

been widened by the subsequent enactments in England then the same would automatically apply in so far as the Admiralty jurisdiction of the Indian Courts is concerned. The Apex Court after tracing the history of the admiralty jurisdiction in both English and Indian courts has held that the jurisdiction of the English Courts as conferred by the Supreme Court of Judicature (Consolidation) Act, 1925 would be applicable even to the Indian Courts and thus the Indian Courts will also have similar jurisdiction as English courts. In view of the aforesaid provisions of law pronounced by the Apex Court, I am of the opinion that the view taken by the larned Single Judge of this Court is no longer a good law. The said judgment of the Single Judge of this Court in the case of Dimitrios Paizis and others vs. Motor Vessel "Nicos" and others (supra) has been impliedly overruled by taking a contrary view by the Apex Court and holding that a view of a narrow jurisdiction of Indian Courts as considered and held by the learned Single Judge of this Court is not the correct view and in fact the jurisdiction of the Indian Courts must be widened as it has been widened of the English Courts of admiralty by subsequent legislation as well. Thus, I am of the opinion that the jurisdiction of the Indian Courts is the same as the jurisdiction of the English Courts in so far as the admiralty jurisdiction is concerned. The jurisdiction therefore would have to be considered

on the basis of the provisions of the Supreme Court of Judicature (Consolidation) Act, 1925.

12. Now turning to the aforesaid provisions of the law i.e. Supreme Court of Judicature (Consolidation) Act, 1925 the relevant provision is section 22 giving the admiralty jurisdiction to the High Courts in England. The said section 22(1) provides that the High Court shall, in relation to admiralty matters, have the following jurisdiction in this Act i.e. the jurisdiction to hear and determine any of the following questions or claims. Under sub-clause (ix) of the said Section it is provided that any claim in respect of the mortgage of any ship, being a mortgage duly registered in accordance with the provisions of the Merchant Shipping Acts, 1894 to 1923, or in respect of any mortgage of a ship which is, or the proceeds whereof are, under arrest of the Court; (emphasis supplied)

The said section 22--(1) is reproduced hereinunder:-

> "22-(1) The High Court shall, in relation to admiralty matters, have the following jurisdiction in this Act referred to as "admiralty jurisdiction") that is to say--
>
> (i) .....

(ii) .....

(iii) ......

(iv) ....

(v) ....

(vii) .....

(viii)

(ix) Any claim in respect of the mortgage of any ship, being a mortgage duly registered in accordance with the provisions of the Merchant Shipping Acts, 1894 to 1923, or in respect of any mortgage of a ship which is, or the proceeds whereof are, under arrest of the Court;

(x) ....

(xi) .....

(xii) .....

In view of the provisions of the said Section 22 of the Act, it is no more necessary that the claim in respect of the mortgage of any ship can be filed in

a court in India only if it is in accordance with the provisions of Merchant Shipping Act, 1894 or newly enacted Merchant Shipping Act, 1958. It also empowers the Court to exercise its jurisdiction where the mortgage is sought to be exercised and a ship which is, or the proceeds whereof, are under arrest of the Court. In the present case, when the suit was instituted by the plaintiffs the vessel was under arrest by this Court. The vessel was subsequently sold by this Court and the sale proceeds of the same are within the jurisdiction of this Court. Thus, in view of the provisions of the aforesaid law and in view of the judgment of the Apex Court in the case of M.V. Elisabeth (supra), I am of the opinion that this Court has jurisdiction to entertain and try the present suit. However, the learned counsel appearing for the defendant no. 3 has brought to my attention the judgment of the Division Bench of this Court in the case of Islamic Republic of Iran Shipping Lines vs. m.v. MEHRAB and others, reported in [2002(4) Mh.L.J. page 584 and sought to contend that the judgment of M.V. Elisabeth and others (supra) has been distinguished by the Division Bench of this Court and, therefore, the said view which I am inclined to take is not the correct view. I have considered the judgment of the Division Bench of this Court. I do not find that on this material point, namely, in a case of a mortgage suit any distinction being carved out by the

Division Bench pertaining to the jurisdiction of this Court in respect of the mortgage of the ship. I do not find from the perusal of the judgment that the Division Bench has taken any different view than the view expressed by the Apex Court that all the legislations right from the Supreme Court of Judicature (Consolidation) Act, 1925 must be applied and the jurisdiction of the Court exercising admiralty jurisdiction must be determined as it is conferred by the aforesaid Act on English Courts. In view thereof, I am not inclined to accept the objections raised pertaining to the jurisdiction of this Court in so far as the present suit is concerned. I hold that this Court has jurisdiction to entertain and try the present suit. I also hold that the judgment of the learned Single Judge in the case of Dimitrios Paizis and others vs. Motor Vessel "Nicos" and others (supra) is no longer a good law and impliedly overruled by the judgment of the Apex Court in the case of M.V. Elisabeth and others (supra).

13. This leads me to the second preliminary issue raised by the defendants namely, the maintainability of the suit. The maintainability of the suit has been challenged on two different facets of the matter. The first ground on which it has been challenged is that the suit is not maintainable because the suit has been filed only against the

defendant vessel and not against the Gulf Oil Company. Furthermore, no decree for the claim of the mortgaged amount as against the defendant vessel has been prayed nor an enforcement of any such mortgage claim has been sought by the plaintiffs in the present suit. It has been thus contended that the suit as framed is not maintainable. It has been contended that once the Gulf Oil is not a party to the present suit, the prayers except the prayer clause (f) cannot be entertained at all. In so far as prayer clause (f) is concerned, it has been contended that that can be granted only if there is either a decree against the defendant vessel or against Gulf Oil for the purpose of exercising the power for realising the security. In absence of any decree adjudicating the mortgage claim by this Court as an amount outstanding and due and payable by the defendant no. 1 by the Gulf Oil, this Court cannot pass any decree straightaway for execution without determination of substantive rights between the parties. It has been contended that it is an admitted position that Gulf Oil is not a party to the present proceedings. Thus a determination of the mortgage claim as against the Gulf Oil is not possible. Thus, it has been contended that all the prayers except prayer (f) must fail in the absence of Gulf Oil being joined as a necessary or a proper party. In so far as prayer (f) of the suit is concerned the same cannot be granted because that is

in the nature of execution, for sale of the vessel. Unless there is a decree for the claim of mortgage debt either against defendant no. 1 or the said Gulf Oil the realisation of the security cannot be granted because it has to be in satisfaction of the substantive decree passed by this Court. On the other hand, the learned counsel for the plaintiffs has contended that the suit as framed against the defendant no. 1 is maintainable. He has sought to distinguish between the claim in rem and a claim in personam. It has been contended that the claim as against the defendant is a claim in rem and is permissible in law to be maintained even without making any claim or seeking decree against Gulf Oil which would be action in personam. It has been contended by the plaintiffs that even if the Gulf Oil is not joined as a party then the plaintiffs can not obtain a decree against the same however still they are entitled to a decree as against the vessel because the vessel is a party defendant in the suit and the decree in rem is sought against the said vessel. It has been further contended that it is immaterial that there should be any prayer for a declaration of a mortgage claim and/or further a substantive decree adjudicating the said mortgage claim as against the defendant no. 1 vessel. It is his contention that prayer (f) as it stands can be granted by this Court without any substantive decree and thus he can realise the said mortgage amount and

in the present case since the sale proceeds is lying in the Court he is entitled to the same. Alternatively it has been contended that assuming that the contention of the defendants is right that there should be a prayer for substantive decree then in that event it has been contended that prayer clauses (a) (iii) and (iv) are prayers for substantive decree against the vessel and thus this Court must grant prayer clause (a)(iii) and (iv) and consequently grant prayer clause (f) and thus the plaintiffs will be entitled to the suit claim and consequently the amount lying deposited in this Court. In support of the aforesaid submission, the learned counsel has once again relied upon the judgment of the Apex Court in the case of M.V. Elisabeth and others (supra).

14. The second facet on which the maintainability of the suit has been challenged by the defendant is clause 19 of the Deed of Covenants in respect of the mortgage of the said vessel which is annexed by the plaintiff to the present suit. The said clause 19 of the Agreement reads as under:-

> "Proper Law and Jurisdiction
>
> This Agreement shall in all respects be governed by and be construed and interpreted and take effect in accordance with the laws

of England and Wales and the Owner and Mr Al Suwaidi each submits to the non-exlusive jurisdiction of the English Courts."

It has been contended that under clause 19 the relevant law which is applicable to the subject matter of the agreement is laws of England and Wales and not the Indian Laws. It has been contended that the suit has to be decided and determined in accordance with the laws of England and not the laws of India. It has been contended that the plaintiffs have filed the present suit on the basis that the relevant law applicable to the mortgage is an Indian Law and have sought a decree. It has been contended that when a suit is filed in respect of a transaction which is governed by foreign law then it is necessary that the plaintiffs must aver in the said suit that it is governed by the foreign law and must also set out various provisions of the foreign law under which he is seeking to establish his claim. It has also been contended that the question which foreign law is applicable and what are the provisions of the same are questions of facts which are to be pleaded and proved by the plaintiffs and in absence thereof this Court cannot consider the suit claim and pass any decree in favour of the plaintiffs. It has been contended that in the present suit there is no averment of any nature whatsoever that the laws of England apply nor are

there any details set out of the provisions which are applicable of the English Law. There is no evidence led pertaining to what are the provisions of the English Law are applicable to the suit agreement and thereunder mortgage is sought to be enforced. In the absence of any such averment and/or evidence the present suit according to the defendants is liable to be dismissed.

15. In support of the aforesaid contention, the learned counsel for the defendants has relied upon the judgment of the Apex Court in the case of Hari Shanker Jain vs. Sonia Gandhi reported in (2001) 8 SCC 233 particularly paragraphs 24, 26, 27 and 28 which are reproduced as under :-

> "24. It is the duty of the court to examine the petition irrespective of any written statement or denial and reject the petition if it does not disclose a cause of action. To enable a court to reject a plaint on the ground that it does not disclose a cause of action, it should look at the plaint and nothing else. Courts have always frowned upon vague pleadings which leave a wide scope to adduce any evidence. No amount of evidence can cure basic defect in the pleadings.

"The two appellant election petitioners have at several places in their election petitions made certain averments relating to Italian law based whereon they have tried to build a case that the respondent could not have renounced the Italian citizenship and become a citizen of India when she applied for and was issued a certificate of citizenship under Section 5(1)(c) of the Citizenship Act. We have carefully perused the averments made in the two election petitions in this regard and we are definitely of the opinion that the averments are bald allegations without any basis thereof and do not amount to pleading material facts which may warrant any enquiry into those allegations.

27. Italian law is a foreign law so far as the courts in India are concerned. Under Section 57 (1) of the Indian Evidence Act, 1872, the court shall take judicial notice of, inter alia, all laws in force in the territory of India. Foreign laws are not included therein. Sections 45 and 84 of the Evidence Act permit proof being tendered and opinion of experts being adduced in evidence in proof of a point of foreign law. Under Order 6 Rule 2 of the Code of Civil

Procedure, 1908, every pleading shall contain a statement in concise form of the material facts relied on by a party but not the evidence nor the law of which a court may take judicial notice. But the rule against pleading law is restricted to that law only of which a court is bound to take judicial notice. As the court does not take judicial notice of foreign law, it should be pleaded like any other fact, if a party wants to rely on the same (see Mogha's Law of Pleadings, 13th Edn., p. 22). In Guaranty Trust Co. of New York v. Hannay & Co. (1918) 2 KB 623 it was held that: "Foreign law is a question of fact to an English court .. the opinion of an expert on the fact, to be treated with respect, but not necessarily conclusive." In Beatty v. Beatty (1924) KB 807 it was held that the American law in English courts must be proved by the evidence of experts in that law. In Lazard Bros. and Co. v. Midland Bank, Ltd., 1933 AC 289. Their Lordships of the Privy Council observed that what the Russian Soviet law is, is a question of fact, of which the English court cannot take judicial cognizance, even though the foreign law has already been proved before it in another case. The court must act upon the

evidence before it in that actual case. The statement of law by Halsbury in Laws of England (3rd Edn., Vol. 15, para 610 at p. 335) is that the English courts cannot take judicial notice of foreign law and foreign laws are usually matters of evidence requiring proof as questions of fact.

"28. There is, thus, no manner of doubt that in the courts in India, a point of foreign law is a matter of fact and, therefore a plea based on a point of foreign law must satisfy the requirement of pleading a material fact in an election petition filed before the High Court. The two election petitions do not satisfy this requirement. The averments made in the two election petitions do not go beyond making bald assertions. The pleadings do not give any indication of such Italian law on which are based the averments made in the election petitions -- whether it is any statutory enactment or any other provision or principle having the force of law in Italy. During the course of hearing, we asked the two appellants if they could show us any book, authority or publication based whereon we could form an opinion, even prima facie, in support of the averments relating to

> Italian law made in the election petitions. The two appellants regretted there inability to show us anything."

The Apex Court in the aforesaid judgment has held that the pleadings of a foreign law is a question of fact because of the presumption governed under section 57 of the Evidence Act is not applicable in so far as foreign law is concerned. It only applies to the Indian Law. In the absence of any pleadings and/or any provisions being set out and proved under which a party is seeking to establish his claim under the foreign law, the Court in India cannot entertain the said suit and said suit is liable to be dismissed.

16. On the other hand, the learned counsel for the plaintiffs has contended that in so far as this particular submission is concerned, once a suit is filed under the Admiralty Court Act, 1861 then the provisions which are governed in the present case is the Admiralty Law and not the English Law. He has contended that once this Court has jurisdiction to entertain and try the present suit, then obviously this Court must decide the suit in accordance with the provisions of the Indian Law and not in accordance with the provisions of English Law. Once again, the learned counsel for the plaintiffs has relied upon the judgment of the Apex Court in the

case of M.V. Elisabeth and others (supra) particularly paragraphs 72, 73, 75 and 87 and it has been contended that the Supreme Court has held that once the admiralty jurisdiction is exercised in India then only the Indian Laws apply and not the English law. I have considered both the facets of the maintainability of the suit. While considering the first facet, namely, whether the suit is maintainable in absence of Gulf Oil being joined as a party in the suit and also in the absence of no substantive decree being sought as against the 1st defendant company, adjudication of the claim of mortgage and decree for a debt due and payable under the said mortgage deed whether the plaintiff can maintain the present suit. I am of the opinion that the present suit is not maintainable. It is because all the prayer clauses except the prayer clause (f) are directed as against the Gulf Oil and not against the defendant no. 1 vessel. The contention of the learned counsel that the prayer clauses (a) (iii) and (iv) pertain to the defendant vessel and the same to be treated as prayer for a substantive decree. I am not able to subscribe to the said contention advanced by the learned counsel for the plaintiffs. Firstly because the prayer clauses (a) (i) to (v) are the integral part of prayer clause (a) and reading the said prayer clause (a) together it leaves no manner of doubt that the prayer clause (a) (iii) and (iv) are sought as a consequential

prayers to prayer clauses (a)(i) and (a)(ii) of the said suit. In any event, I do not find that prayer clause (a)(iii) and prayer clause (a) (iv) are in any way seeking a substantive decree for adjudication of the claim of the mortgage and consequently passing a decree for the amount of mortgage due and payable by the defendant no. 1 vessel in rem to the plaintiffs herein. It is no doubt true that a suit is maintainable as against the defendant vessel only if the suit is filed seeking action in rem. However, even for the purpose of maintaining the suit as against the vessel, it is necessary that there must be a decree claimed which is of a substantive nature. But in the absence of any such claim being raised or any such decree for adjudication of the mortgage claim or entering the mortgage is being sought merely by pleading for a consequential decree, suit cannot be entertained at all. In my opinion a Court cannot grant the relief of sale of the vessel unless first it adjudicates the claim of the mortgage and the debt due and payable by the defendant even if the relief is sought only against the vessel as decree in rem. In the present case there are no prayers of any nature even against defendant no.1. There is no prayer for adjudication of the claim of the mortgage, debt as against the vessel and thus even though the suit may be maintainable only against the vessel by seeking a decree in rem in absence of

substantive prayer claiming the said amount as due and payable by the defendant vessel to the plaintiff, the decree for sale of the vessel and realisation of the amount cannot be granted. Thus, in my opinion, the suit has a fatal defect being that a substantive relief of decree of adjudication of mortgage and enforcement thereof is sought against Gulf Oil but the same is not joined as a party whereas when a vessel is joined as a party there is no substantive relief as set out above has been prayed by the plaintiffs. Thus, in my opinion, the said suit is liable to be dismissed on the aforesaid ground of maintainability.

17. Even looking from the second facet that the contract between the parties is governed by the English Law and thus substantive transaction must be decided in accordance with the provisions of the English Law. I am of the opinion that clause 19 of the contract which is extracted hereinabove, makes it undoubtely clear that the parties agreed that the transaction between them will be governed by English laws and not by Indian Laws. In my opinion the said clause 19 of the agreement providing for application of English Law and not the India Law is binding between the parties. In that event the Court must determine the inter se disputes between the parties only in accordance with the law which has been agreed to be governing factor to the transaction

between the parties. In the present case clause 19 makes it clear that the transaction is governed by the substantive law of England and thus in fact the present transaction is governed by the English Law. The contention of the learned counsel for the plaintiffs that because the suit is filed in India under the provisions of the Admiralty Court Act, 1861 thus the provisions of the Admiralty Court Act, 1861 are attracted and consequently the Indian Law applies to the transactions is devoid of any merit. I am of the opinion that the provisions of the Admiralty Court Act, 1861 only provides for a procedural law and not the substantive law governing the transaction between the parties. In the present case once the parties have agreed that the transaction is governed by the English Law the said English Law would apply to the substantive transaction and if the suit is filed in India then the procedural law would be applicable as contemplated under the provisions of the Admiralty Court Act, 1861. I am of the opinion that merely by filing a suit in India because it has a jurisdiction to entertain the claim by virtue of the provisions of Section 22 (1) (ix) of the Supreme Court of Judicature (Consolidation) Act, 1925, this Court would not be entitled to apply Indian Law to the substantive part of the transaction which is governed by the English Law. I am, therefore, of the opinion that the contention of the learned

counsel for the defendants is right and justified that the plaintiffs have not pleaded in the suit the fact that the said transaction is governed by the English Law and it is the English Law under which the plaintiffs are entitled to any such decrees as prayed. The judgment of the Apex Court in the case of Hari Shankar Jain vs. Sonia Gandhi (supra) is clear on the aforesaid aspect that if such a pleading is absent and there is no evidence led on this aspect then the suit must fail. However, the learned counsel for the plaintiffs has inter alia contended that the defendants have not raised the plea pertaining to application of English Law or otherwise and thus, it is not now open for them to contend that the suit is not maintainable because the same is governed by the English Law and there is no pleading in that behalf. The said submission in my opinion is required to be rejected. Firstly, because the issue of maintainability is an issue of law. An issue of maintainability has been raised and the issue of maintainability is not required to be pleaded since it is an issue of law and since the absence of detailed plea about maintainability of the suit would not affect the rights of the defendants to resist the suit on the ground of maintainability. In view of the aforesaid, I hold that the suit is not maintainable on both the aforesaid grounds, namely, that there is no substantive prayer for a decree of mortgage as

against the defendant no. 1 and also that there is no pleadings, averments and evidence pertaining to the fact that the transaction is governed by the English Law and in view thereof I pass the following order.

18. The suit is dismissed. The plaintiffs to pay the costs of the suit to the defendant nos. 2, 3 and 4 each.